

**Theresa v City of New York**

2012 NY Slip Op 32563(U)

October 4, 2012

Supreme Court, New York County

Docket Number: 106718/2011

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 106718/2011  
STEINKOLK, THERESA  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

*CAL. # 105*

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

OCT 10 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/4/12  
OCT 04 2012

BARBARA JAFFE, J.S.C.  
BARBARA JAFFE  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
THERESA a/k/a TESS STEINKOLK,

Index No. 106718/11

Plaintiff,

Argued: 5/29/12

Motion seq. no.: 001

-against-

**DECISION AND ORDER**

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON and EMPIRE CITY SUBWAY,

Defendants.  
-----X

BARBARA JAFFE, JSC:

**For plaintiff:**

Mark Halberstam, Esq.  
1435 Coney Island Ave.  
Brooklyn, NY 11230  
718-377-7337

**FILED**  
OCT 10 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

**For ECS:**

Matthew Matera, Esq.  
Conway, Farrell *et al.*  
Forty Eight Wall St.  
New York, NY 10005  
212-785-2929

By notice of motion dated March 9, 2012, defendant Empire City Subway Company (ECS) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against it or, in the alternative, compelling plaintiff to respond to discovery.

Plaintiff opposes.

Plaintiff alleges that on May 8, 2010, she tripped and fell in a pothole located approximately 18 inches east of the northwest corner of the intersection of 30<sup>th</sup> Street and 9<sup>th</sup> Avenue in Manhattan. (Affirmation of Matthew Matera, Esq., dated Mar. 9, 2012 [Matera Aff.], Exh. C).

ECS denies having performed any work at the accident location before plaintiff's accident, and asserts that while plaintiff provided a permit issued it before plaintiff's accident, its records show that it performed work after the accident and in a different part of the intersection.

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. (*Cino v City of New York*, 49 AD3d 796 [2d Dept 2008]). Here, ECS has offered admissible evidence demonstrating that it performed no work at the location of plaintiff's accident before the accident, thus establishing, *prima facie*, that it did not create the defect at issue. (*See Gueli v City of New York*, 92 AD3d 840 [2d Dept 2012] [contractor submitted affidavit from employee stating that it had no records showing work performed at accident location before accident, and other documents showed work was performed near location after accident]; *Amarosa v City of New York*, 51 AD3d 596 [1<sup>st</sup> Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location, and even if other contractor performed work at location, no evidence that its work was proximate cause of pothole 400 feet away from its work]; *Flores v City of New York*, 29 AD3d 356 [1<sup>st</sup> Dept 2006] [ECS demonstrated it did not perform work where plaintiff allegedly fell as its records showed it performed work on different corner of crosswalk than where plaintiff fell]; *Robinson v City of New York*, 18 AD3d 255 [1<sup>st</sup> Dept 2005] [although contractors performed work on street, no evidence that work was performed at location of plaintiff's fall]; *see also Arias v Skyline Windows, Inc.*, 89 AD3d 460 [1<sup>st</sup> Dept 2011] [affidavit indicating search of business records had demonstrated negative findings admissible and can substantiate movant's summary judgment burden]).

In opposition, plaintiff submits no proof showing that a triable issue of fact exists as to whether ECS performed work at the location of her accident. (*See Siegel v City of New York*, 86 AD3d 452 [1<sup>st</sup> Dept 2011] [rejecting plaintiff's argument that proximity of ECS conduit to alleged defect raised triable issue as to whether ECS' work caused defect]; *Minier v City of New*

*York*, 85 AD3d 1134 [2d Dept 2011] [plaintiff's only evidence was permit issued to contractor which did not encompass area where plaintiff fell]; *Elkman v Consol. Edison of New York*, 71 AD3d 817 [2d Dept 2010] [plaintiff failed to raise triable issue as to whether defendants performed work in area of sidewalk where accident occurred]; *Flores*, 29 AD3d at 356 [(a) best, plaintiff demonstrated that ECS was present at the site some eight months before plaintiff's fall, which is insufficient to raise a triable issue of fact as to whether ECS worked in the crosswalk where plaintiff fell]).

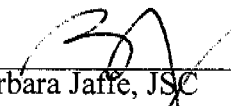
Plaintiff's assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis. (CPLR 3212[f]; see *Flores v City of New York*, 66 AD3d 599 [1<sup>st</sup> Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Rubina v City of New York*, 51 AD3d 761 [2d Dept 2008] [no evidentiary basis showing that further discovery may lead to relevant evidence concerning whether contractor created defect]; *Arrucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [plaintiffs failed to establish what additional facts might be disclosed which would demonstrate that issue of fact existed as to whether contractor did work on roadway]).

Accordingly, it is hereby

ORDERED, that defendant Empire City Subway's motion for summary judgment is granted, and the complaint and any cross claims are dismissed against defendant Empire City Subway with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue, and the DCM clerk is directed to schedule a preliminary conference in this matter and notify the parties accordingly.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: October 4, 2012  
New York, New York

OCT 04 2012

**FILED**  
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